KOH MONG HUAT v. LEMBAGA PADI DAN BERAS NEGARA

[A.Cr.J. (Seah J.) October 21, 1981 & November 7, 1981]
[Kuching — Criminal Appeal No. 11 of 1981]

Criminal Law and Procedure — Confiscation — Conviction under Lembaga Padi dan Beras Negara Act, 1971 — Discretion to order confiscation — Lembaga Padi dan Beras Negara Act, 1971, s. 29.

In this case the appellant was convicted on three charges of (i) failing to affix labels or tags on two gunny bags of rice offered for sale; (ii) failing to exhibit his rice retail licence in a conspicuous position at the business premises; and (iii) keeping 67 gunny bags of rice at 35, Jalan Ong Guan Cheng, Bau, which is not the business premises under the said licence. The appellant was fined and in addition the learned Magistrate ordered the 2 gunny bags of rice under the 1st charge and the 67 gunny bags of rice under the 3rd charge to be forfeited. The order confiscating the 67 gunny bags of rice was set aside and the learned Magistrate was asked to hold an enquiry to ascertain the facts. After holding the enquiry the learned Magistrate ordered the 67 bags of rice to be confiscated. The appellant appealed.

Held: (1) in this case the power of the trial court to order confiscation of the subject-matter of the offence charged is discretionary and such discretion must be exercised judicially;

(2) in this case the learned Magistrate stated that the appellant was hoarding the rice and knew of the condition of the licence and knowingly broke it. However the appellant was not charged with hoarding and there was in fact no hoarding in law and the facts did not support the finding of the learned Magistrate that the appellant knew he was contravening the law. The learned Magistrate had therefore exercised his discretion on wrong principles and the order for forfeiture must be quashed.

Cases referred to:-

(1) *Public Prosecutor* v. *Ong Ah Kau & Ors.* [1976] 2 M.L.J. 31.

(2) *Evans* v. *Bartlam* [1937] A.C. 473, 479.

CRIMINAL APPEAL.

Chan Kay Heng (*Chan Khoon Ted* with him) for the appellant.

Nik Hashim bin Nik Abdul Rahman, Deputy Public Prosecutor (*Abang Abdul Rahaman bin Datuk Haji Abdul Rahim,* Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Seah J.: In Criminal Appeal No. KG.5/80 where the appellant was Koh Mong Huat alias Kueh Moh Huat and Lembaga Padi dan Beras was the respondent, I set aside the order confiscating the 67 gunny bags of rice and ordered the said trial Magistrate to conduct an enquiry to ascertain the facts whether or not to exercise the power contained in section 29(1) of the Lembaga Padi dan Beras Negara Act 1971. After holding an enquiry the said Magistrate ordered that the 67 bags of rice comprising Exhibit P5 be forfeited to the Government and are to be disposed of by the Director General. The appellant was dissatisfied with this order and has again appealed to the High Court.

Briefly, the appellant was charged and convicted on his own pleas of (i) failing to affix labels or tags on 2 gunny bags of rice offered for sale (1st charge), (ii) failing to exhibit his rice retail licence in a conspicuous position at the business premises at No. 35, Jalan Ong Guan Cheng, Bau (2nd charge) and (iii) keeping 67 gunny bags of rice at No. 35, Jalan Ong Guan Cheng, Bau, which is not a business premises under the said licence (3rd charge). In addition to finding the appellant, the trial Magistrate ordered the 2 gunny bags of rice under the 1st charge and the 67 gunny bags of rice under the 3rd charge to be forfeited.

Reg. 6(2) of the Lembaga Padi dan Beras Negara (Licensing of Wholesale and Retail Dealers) Regulations 1973 provides that

"the Licensee shall not store or keep or permit to be stored or kept rice to which this licence is subject except at the business premise or stores specified in the licence."

It is common ground that the business premise specified in the appellant's licence is at No. 1, Tai Ton Bazaar, Bau.

Now, section 29(1) of the Lembaga Padi dan Beras Negara Act 1971 reads:

"29(1) Where any person is convicted of an offence under this Act or under any regulation made thereunder the court may order the confiscation in whole or in part of:

(a) any padi or rice in respect of which the offence has been committed which has been seized by, or has otherwise come into the possession of the Director General or any authorised officer or police officer or any vehicle, vessel or other article, the property of the accused, by means of which such offence has been committed or which is intended to be used for the commission of an offence under this Act or under any regulation made thereunder; or

(b) the proceeds of sale of any such padi or rice if it has been sold under section 22.

(2) Where confiscation is ordered under subsection 1, the court shall deliver such padi or rice or the proceeds of the sale thereof (if not already in possession of the Director General) to the Director General or to any person designated by him, and shall give directions as to its disposal."

In *Public Prosecutor* v. *Ong Ah Kau & Ors.*[1] Syed Agil Barakbah J. held that the power of the trial court to order confiscation of the subject-matter of the offence charged is not mandatory but discretionary. On what basis must the trial Magistrate act when he makes an order of confiscation of the goods in respect of which the offence has been committed? In my opinion, since the legislature has deemed fit to leave it to the trial Magistrate to exercise the discretionary power, no general rule should be laid down and each case must be decided on its own facts. Needless to say, the discretion must be exercised judicially and not capriciously.

At page 12/13 of the notes of enquiry the trial Magistrate said:

"The move must also be taken by the court to mean that rice stocks allocated to the accused for sale to the public at Tai Ton bazaar and thereabout had been removed to Bau for sale and as such constitute a removal from sale of this essential commodity from the inhabitants of the area. Bearing in mind the road conditions in the area, this unilateral decision on the part of the accused is forcing the inhabitants there to purchase rice from Bau or do without it would amount to an act of hoarding....

In view of the facts and circumstances adduced by the enquiry, the court is of the opinion that the accused in depriving the inhabitants of his locality from a readily available supply of rice was amounting in fact to hoarding it from them from stocks allocated to him for that purpose." (p. 14).

Counsel for the appellant has submitted, rightly so in my opinion, that his client had never been

charged for hoarding or concealing rice under Reg. 6(3) of the Lembaga Padi dan Beras Negara (Licensing of Wholesale and Retail Dealers) Regulations 1973 and it was wrong for the trial Magistrate to make such a finding in order to justify his act and order confiscation of the 67 gunny bags of rice. Under the rice retailer licence (Exhibit P5) granted to the appellant he is allowed to store not exceeding 168 piculs of rice on the business premises and as long as he maintains this limit he cannot by any stretch of the imagination be said to be hoarding rice without some evidence of concealment. And there was none here. On the facts, the finding of hoarding by the trial Magistrate cannot be supported.

Next, the trial Magistrate said at page 13:

"Accused has testified he was unaware of the need to inform LPW of the change (of address). Accused is not illiterate and has been in the rice business since 1974. Ignorance of law is no defence although the court does not seek to hastily punish an accused for a mere mistake. However, if a mistake is self-induced and accused is grossly negligent in serving to his affairs as a prudent man of business should, that gross negligence may amount to knowledge of the circumstances. In view of the facts, the court finds it hard to believe that accused was totally ignorant of the condition of his licence...."

In *Evans* v. *Bartlam*[2] Lord Atkin said:

"For my part I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."

Applying this test to the 3rd charge it is clear that the appellant cannot successfully plead ignorance of Reg. 6(2) in answer to the charge.

But in my opinion, ignorance of the law, *a fortiori*, a statutory offence where *mens rea* is not required, is a factor to be considered in order to determine whether or not the appellant had *mens rea* in fact. Now, what are the facts? It seems to be not in dispute that because of poor business at No. 1, Tai Ton bazaar, Bau, the appellant moved his business to No. 35, Jalan Ong Guan Cheng, Bau (see 2nd charge) in 1976. Since that time, the rice retailer licence of the appellant had been renewed at least on 5 separate occasions by the authority.

On these uncontradicted facts it would be quite difficult to hold that the appellant had *mens rea*.

Since the trial Magistrate ruled that there was hoarding when there was in fact no hoarding in law and since he also ruled that there was some *mens rea* when the facts did not support this finding, I am constrained to hold that the trial Magistrate had purported to exercise his discretion on wrong principles. Under the circumstances, I have no alternative but to quash the order of forfeiture of the 67 gunny bags of rice. I order that the 67 gunny bags of rice be returned to the appellant forthwith.

Order accordingly.

Solicitors: *Chan & Chan.*

MUN LOONG CO. SDN. BHD. v. CHAI TUCK KIN

[O.C.J. (Mohamed Azmi J.) November 13, 1981]
[Kuala Lumpur — Civil Suit No. 2188 of 1977]

Passing-off — Business name "Mun Loong" — Whether plaintiff had monopoly in use of the word "Mun Loong" meaning "a lot of prosperity" — Different types of business carried out by both parties — Injunction sought refused — Application of common law principles.

The plaintiff company had two departmental stores in Kuala Lumpur. It sued the defendant in the tort of passing-off at common law, and claimed for an injunction to restrain the defendant from using the words "Mun Loong" as part of, or in connection with his optical goods business at No. 133 Jalan Ipoh.

Held, dismissing the plaintiff's claim:— (1) injunction will be granted, if as a matter of fact, the defendant's business name is calculated to deceive either by diverting customers from the plaintiff to the defendant, or by occasioning a confusion between the two businesses. But where, as in the present case, the defendant carries on different type of business from that of the plaintiff, it must be shown that the defendant has done something to deceive;

(2) the words "Mun Loong" are known Chinese words meaning "a lot of prosperity". It is the common objective of all business enterprise to be properous and in the absence of evidence that the defendant was dishonest in adopting that name, there was no good reason why the defendant should not trade under the name "Mun Loong."

[Editorial Note: See note "Passing off — Boutique with similar name" at [1981] 2 M.L.J. cl.]

Cases referred to:-

(1) *The North Cheshire & Manchester Brewery Co. Ltd.* v. *The Manchester Brewery Co. Ltd.* [1899] A.C. 83.
(2) *Ewing* v. *Buttercup Margarine Co. Ltd.* [1917] 2 Ch. 1.
(3) *A.G. Spalding & Brothers* v. *A.W. Gamage Ltd.* [1915] 32 R.P.C. 273.
(4) *Treasure Cot Co. Ltd.* v. *Hamley Bros. Ltd.* [1950] 67 R.P.C. 89.
(5) *Baume Co. Ltd.* v. *A.H. Moore Ltd.* [1958] 1 Ch. 907.
(6) *Henderson & Anor.* v. *Radio Corp. Pty. Ltd.* [1969] R.P.C. 218.
(7) *The Clock Ltd.* v. *The Clock House Hotel Ltd.* [1936] 53 R.P.C. 269.
(8) *British Legion* v. *British Legion Club (Street) Ltd.* [1931] 48 R.P.C. 555.
(9) *Totalizator Agency Board* v. *Turf News Pty. Ltd.* [1972] R.P.C. 579.
(10) *Eastman Photographic Materials Co. Ltd.* v. *The John Griffiths Cycle Corp. Ltd. & The Kodak Cycle Co.* [1898] 15 R.P.C. 105.
(11) *Lloyd's* v. *Lloyd's (Southampton) Ltd.* [1912] 29 R.P.C. 433.
(12) *Harrods Ltd.* v. *R. Harrod Ltd.* [1924] 41 R.P.C. 74
(13) *Dunlop Pneumatic Tyre Co. Ltd.* v. *The Dunlop Motor Co.* [1907] A.C. 430.

(The following cases were cited but not mentioned in judgment: *The Society of Motor Manufacturers & Traders Ltd.* v. *Motor Manufacturers' & Traders' Mutual Insurance Co. Ltd.* [1925] 1 Ch. 675, *Levy* v. *Walker* (1879) 10 Ch. 436.)

CIVIL SUIT.

Lee Tatt Boon for the plaintiff.

Wong Soon Foh for the defendant.

Mohamed Azmi J.: The plaintiff company, which has two departmental stores in Kuala Lumpur, is suing the defendant in the tort of passing-off at common law, and claims for an injunction to restrain the defendant from using the words "Mun Loong" as